

STELLAR WIND AND THE INTELLIGENCE OVERSIGHT BOARD REPORTS

As I noted, the NSA released its quarterly reports to the Intelligence Oversight Board as a FOIA-coal-for-Christmas present. In them, we see how the NSA executed a bit of legal chicanery with respect to Stellar Wind which had previously been revealed in the 2009 Draft IG Report on Stellar Wind.

The report claims that NSA's Inspector General did not get read into the program until August 2002. The IG Report claims to be mystified as to why NSA operated an illegal program for 9 months before reading in the IG; it offers the suggestion that President Bush didn't want to read in the IG until NSA had a named IG, rather than an Acting one – but that doesn't explain why they waited 4 months after Joel Brenner came in in April 2002.

(TS//SI//NF) We could not determine exact reasons for why the NSA IG was not cleared for the PSP until August 2002. According to the NSA General Counsel, the President would not allow the IG to be briefed sooner. General Hayden did not specifically recall why the IG was not brought in earlier, but thought that it had not been appropriate to do so when it was uncertain how long the Program would last and before operations had stabilized. The NSA IG pointed out that he did not take the IG position until April 2002, so NSA leadership or the White House may have been resistant to clearing either a new or an acting IG.

One of the things Brenner instituted – the

report claims it started almost a year after he came in and more than 6 months after he got read into the program – was to make the IOB reports technically correct by stating that there might be incidents not noticed to IOB but instead noticed to the President.

(C) Second, in March 2003, the IG advised General Hayden that he should report violations of the Authorization to the President. In February of 2003, the OIG learned of PSP incidents or violations that had not been reported to overseers as required, because none had the clearance to see the report.

(TS//SI//OC/NF) Before March 2003, NSA quarterly reports on intelligence activities sent to the President's Intelligence Oversight Board (through the Assistant to the Secretary of Defense for Intelligence Oversight) stated that the Director was not aware of any unlawful surveillance activities by NSA other than that described in the report. Beginning in March 2003, at the IG's direction, NSA quarterly reports stated that except as disclosed to the President, the Director was not aware of any unlawful surveillance activities by NSA. Also beginning in March 2003, PSP violations, including those not previously reported to the Intelligence Oversight Board, were reported in "Presidential Notifications."

But that's actually not correct. The change appears in the December 4, 2002 report.

(U//FOUO) Except as previously reported to you or the President, or otherwise stated in the enclosure, we have no reason to believe that any intelligence activities of the National Security Agency during the quarter ending 30 September 2002 were unlawful or contrary to Executive Order or Presidential Directive, and thus required to be reported pursuant to Section 1.7.(d) of Executive Order 12333.

If the remaining chronology is correct – that Brenner had not yet convinced Hayden to tell the President about violations and that there were some February 2003 violations that did not get

reported – then the December 2002 report was inaccurate, because the President would not have been noticed.

What I find interesting about it is how signatures were handled before that. In the June 2002 report – at a time when Brenner was not read into the program – he signed the report himself. In the August 27, 2002 report (which was presumably submitted just after Brenner got read into Stellar Wind), Brian McAndrew, who had been Acting IG before Brenner took over, signed for him.

Brian McAndrew
for
JOEL F. BRENNER
Inspector General

And, in perhaps related metadata, there's this, from the December 2001 report (that is, the first one after the initiation of Stellar Wind).

to the Inspector General and General Counsel. Per PIOB letter of 6 August 1982, Agency heads are responsible for reporting separately any additional reportable activities known to them, unless the President has specifically instructed that the Board is not to be informed. Director's signature signifies that no other activities which require reporting are known to him.

RECOMMENDATION: Director sign the enclosed memorandum.

*To: OGC
Bob -
set in talk before
I sign this
Thanks*

*and Affiliated
directors*

ed for Release by NSA on 12-19-2014,
Case # 70809 (Litigation)

I think, though am not certain, this note comes from Michael Hayden (with an "H" in the circle), to whom the memo is addressed. He appears to have asked Robert Deitz to discuss the implications of this notice further before he signed it. And someone amended the notice, to include violations known to affiliated (agency?) directors but not to Hayden.

That is, it seems possible that even Michael Hayden hesitated to say this report included all violations of law without Robert Deitz (who has written some robust defenses of NSA since the Snowden leaks) holding his hand somewhat.

Update: Note that the coversheet with Hayden's

note was initially dated December 7, 2001. But the date on the letter he signed was January 4, 2002. That suggests they could have actually changed the content of the letter in response to Hayden's concerns, though such a delay appears normal given the other reports.

Of course, this entire structure is premised on the caveat that the President can instruct agency heads not to include violations he doesn't want them to. And the gaming of some signatures to avoid making false declarations is child's play compared to what Obama did at the beginning of his Administration, which was basically to let the entire board lapse by not appointing anyone.

Still, the games they were playing with their declarations suggests these men – who've made broad comments about how well NSA follows the law – know they were fibbing.